In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-246

ERNEST TURLEY,
Petitioner,

vs.

DONALD WYRICK, Warden, Missouri State Penitentiary,
Respondent.

SUGGESTIONS IN OPPOSITION TO PETITION FOR CERTIORARI

JOHN ASHCROFT
Attorney General
PRESTON DEAN
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321
Attorneys for Respondent
NANETTE LAUGHREY
Assistant Attorney General
Of Counsel

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-8030

INDEX

Table of Cases

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-246

ERNEST TURLEY,
Petitioner,

vs.

DONALD WYRICK, Warden, Missouri State Penitentiary,
Respondent.

SUGGESTIONS IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the Missouri Court of Appeals, St. Louis District, affirming the appellant's conviction for robbery in the first degree with a dangerous and deadly weapon is reported as *State* v. *Turley*, 518 S.W.2d 207 (Mo.Ct.App. at St.L. 1974). Petitioner's first application for certiorari to the United States Supreme Court was denied in *Turley* v. *Adams*, 404 U.S. 1024 (1972). His second petition for certiorari to the United States Supreme Court was denied in *State* v. *Turley*, 421 U.S. 966 (1975).

The opinion denying the appellant's petition for writ of habeas corpus in the United States District Court for the Eastern District of Missouri, Eastern Division, was filed on April 5, 1976. It is reported at 415 F.Supp. 87 and is set out in full in the petitioner's appendix at p. 16a. The United States District Court decision was affirmed in a per curiam opinion of the United States Court of Appeals for the Eighth Circuit in the cause styled *Ernest Turley, Appellant* v. *Donald Wyrick, Appellee,* No. 76-1538, filed April 14, 1977. It is set out in full in the petitioner's appendix at p. 1a.

JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Eighth Circuit and thereby invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Was the United States Court of Appeals for the Eighth Circuit correct in holding that the appellant's conviction in state court for robbery in the first degree did not subject him to double jeopardy, even though he had previously been acquitted by a federal jury on the same charges?

A.

Is the doctrine of dual sovereignty still viable so that a criminal defendant can be prosecuted by both the federal and state governments for the same act?

B.

Does the doctrine of collateral estoppel prevent a state from prosecuting a criminal defendant who has been acquitted in federal court except in those circumstances where the state's interests are so substantially different from federal interests that prosecution by the federal government would not sufficiently protect the state's interest?

(1) Must a criminal defendant who raises the defense of collateral estoppel present a transcript of his first trial so that the court can determine what issues were decided in that prior proceeding?

STATEMENT OF THE CASE

Shortly after noon, June 11, 1970, the Laddonia State Bank, the deposits of which were insured by the FDIC, was robbed by two armed men. The petitioner was arrested in St. Louis, Missouri, on June 24, 1970. On July 1, 1970, the grand jury of the United States District Court for the Eastern District of Missouri, Eastern Division, returned an indictment against the petitioner and Clarence Edward Haynes, charging them with violation of 18 U.S.C. §2113(a) and (d). On November 23, 1970, the petitioner was acquitted of this charge, following a trial by jury.

On January 4, 1971, the Prosecuting Attorney of Audrain County, Missouri, filed an information charging the petitioner with robbery in the first degree by means of a dangerous and deadly weapon, pursuant to §560.120, RSMo 1969. On January 15, 1971, petitioner filed a motion to dismiss alleging his prior acquittal was a bar to subsequent prosecution for the same act. Petitioner's motion to dismiss was presented and overruled on February 1, 1971. The Missouri Supreme Court denied petitioner's

application for writ of prohibition and the United States Supreme Court denied certiorari in *Turley* v. *Adams*, 404 U.S. 1024 (1972). Following a change of venue, trial began on March 28, 1972. On March 30, 1972, the jury found the petitioner guilty of robbery in the first degree. The petitioner's punishment was assessed at twenty years imprisonment in the custody of the Missouri Department of Corrections. The appellant's conviction was affirmed by the Missouri Court of Appeals, St. Louis District. *State* v. *Turley*, 518 S.W.2d 207 (Mo.Ct.App. at St.L. 1974). His second petition for certiorari was denied in *State* v. *Turley*, 421 U.S. 966 (1975).

On February 18, 1976, the appellant filed in the United States District Court for the Eastern District of Missouri, Eastern Division, a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 in the cause styled *Ernest Turley, Petitioner* v. *Donald Wyrick, Warden, Respondent*, No. 76-130C(2). On April 5, 1976, the Honorable John K. Regan, Judge of the United States District Court for the Eastern District of Missouri, Eastern Division, entered an order denying, on the merits, the appellant's petition for writ of habeas corpus. On June 10, 1976, Judge Regan granted the appellant's motion for a certificate of probable cause. An appeal to the United States Court of Appeals for the Eighth Circuit followed. That court returned its decision on April 14, 1977 affirming the United States District Court's decision that the appellant had not been subjected to double jeopardy even though he had been convicted in state court after having been acquitted in federal court for the same robbery. The court specifically held that the United States Supreme Court's holding in *Bartkus* v. *Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959), reaffirming the doctrine of dual sovereignty had not been overruled and was controlling in this fact situation. It

also held that the collateral estoppel doctrine would not apply in this case because two sovereigns and thus different parties were involved in the litigation. In a footnote the Court also noted that the petitioner's collateral estoppel argument must fail because he did not introduce in evidence a transcript of his federal trial to enable the court to determine what issues had previously been determined.

In a concurring opinion the Honorable Judge Lay indicated that he was bound by the United States Supreme Court decisions in *Bartkus* v. *Illinois*, *supra*, and *Abbate* v. *United States*, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959). He pointed out, however, that these decisions had been eroded by subsequent decisions of the United States Supreme Court and that the doctrine of *stare decisis* in this situation was perpetuating an injustice.

On April 28, 1977, petitioner filed a timely petition for rehearing and suggestions for rehearing en banc. This petition was denied, with Circuit Judge Heaney dissenting and Circuit Judge Bright expressing agreement with Judge Lay's concurring opinion. A copy of this ruling is found in the petitioner's appendix at p. 15a.

ARGUMENT

I.

The United States Court of Appeals for the Eighth Circuit was correct in holding that the appellant's conviction for robbery in the first degree did not subject him to double jeopardy even though he had previously been acquitted by a federal jury on substantially the same charges.

A.

The doctrine of dual sovereignty is still viable so that a criminal defendant can be prosecuted by both the federal and state governments for the same act.

In this proceeding the petitioner seeks review of the doctrine of dual sovereignty as established in *Fox* v. *Ohio*, 5 How. 410 (1847) and reaffirmed in *Bartkus* v. *Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959), and *Abbate* v. *United States*, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959). It is the petitioner's contention that the "primary underpinning" of the dual sovereignty doctrine was undermined by this Court in *Benton* v. *Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) and that the doctrine has been further eroded in *Elkins* v. *United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960); *Murphy* v. *Waterfront Commissioners*, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964) and *Waller* v. *Florida*, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970). The United States Court of Appeals for the Eighth Circuit, however, correctly noted that there has been nothing in decisions by the United States Supreme Court since *Bartkus* v. *Illinois* to indicate that the doctrine of dual sovereignty is no longer applicable. In *Benton* v. *Maryland*, *supra*, the United States Supreme

Court merely held that the Fifth Amendment guarantee against double jeopardy did apply directly to the states and that a defendant could not be prosecuted twice in state court for the same offense. While it is true that this decision did in fact overrule one portion of the *Bartkus* decision, there is nothing to indicate that the decision in *Benton* v. *Maryland* in any way undermined the doctrine of dual sovereignty. In the *Benton* case the prosecutions were both in state court so the doctrine of dual sovereignty was in no way applicable.

Moreover, in *Abbate* v. *United States, supra*, decided the same day as *Bartkus*, the United States Supreme Court held that the double jeopardy clause of the Fifth Amendment did not bar a trial in the federal court after an acquittal for the same offense in state court. The application of the Fifth Amendment to the states by virtue of the Fourteenth Amendment, the question addressed in *Palko* v. *Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937), *Bartkus* and *Benton*, was not an issue in *Abbate*. Still the Court held that the Fifth Amendment double jeopardy provision did not bar the subsequent federal prosecutions. In reaching its decision, the Supreme Court primarily relied on the premise that because of the bifurcated nature of our system, the same act may be an offense against the laws of the United States and also against the laws of an individual state and may be punishable by both. This Court pointed out that to hold otherwise would seriously interfere with law enforcement both at the state and federal levels.

The petitioner also argues that the doctrine of dual sovereignty was eroded in *Elkins* v. *United States, supra; Murphy* v. *Waterfront Commissioners, supra;* and *Waller* v. *Florida, supra*. In neither *Elkins* nor *Murphy* did this Court address itself specifically to the problem of dual

sovereignty. Both cases were concerned only with the manner in which a conviction could be obtained. Neither questioned the power of the separate sovereigns to prosecute. In fact, the Court in *Elkins* must have presumed that dual prosecution by state and federal officials was permissible. The question of using identical evidence in both the state and federal prosecution would only come up if the same act was being prosecuted. Furthermore, in both cases the dual sovereignty doctrine was being used to circumvent a criminal defendant's constitutional rights. It was not the act of prosecution itself which was reprehensible in those cases but the government's attempt to gain an advantage by using the doctrine of dual sovereignty as a shield. Moreover, in *Waller* v. *Florida, supra,* this Court merely held that a municipality was not a sovereign and therefore the doctrine of dual sovereignty did not apply. It carefully noted that its decision was to be limited to the very specific facts of that case.

The doctrine of dual sovereignty is grounded in this Court's interpretation of the Constitution and there is nothing to indicate that this Court's interpretation is incorrect. The appellant seems to intimate, however, in his petition for certiorari that the doctrine of dual sovereignty should be rejected on public policy grounds. It is the respondent's position, however, that the dual sovereignty doctrine is in accord with public policy. As stated in *Bartkus*:

> "Where the federal prosecution of a comparatively minor offense to prevent state prosecution of a grave infraction of state law, the result would be a shocking and untoward deprivation of the historic right and obligation of the state to maintain peace and order within their confines. It would be a derogation of our federal system to displace the reserved power of

> the states over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the states." *Bartkus* v. *Illinois, supra,* at 137.

It is clear that each jurisdiction has its own interests to be served. A sovereign's public policy should not be thwarted by an adjudication to which it is not party. It is therefore the respondent's conclusion that the United States Court of Appeals for the Eighth Circuit correctly concluded that the doctrine of dual sovereignty has continuing validity and is applicable in this case. This issue need not once again be reviewed by this Court.

B.

The Missouri court was not collaterally estopped from prosecuting the appellant for robbery in the first degree even though the petitioner had been acquitted for the same act by a federal jury.

The petitioner seeks a ruling from this Court on whether *Ashe* v. *Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) precluded his prosecution by state officials once he had been acquitted in federal court. He argues that the doctrine of collateral estoppel is applicable if the parties in successive state and federal prosecutions are in privity. The petitioner then explains why in this case the state was in privity to the federal government and concludes that the state was therefore estopped from prosecuting him for the same offense.

The petitioner's argument must fail, however, because *Ashe* v. *Swenson, supra,* merely held that the doctrine of collateral estoppel is part of the Fifth Amendment guarantee against double jeopardy. Clearly, the doctrine of dual sovereignty is based on this Court's interpretation of the double jeopardy provision. The doctrine of dual sover-

eignty, therefore, could be no less applicable to collateral estoppel than it is to successive prosecutions of the same person for the same offense. The petitioner seeks to argue that the interests of the individual and the interests of the federal and state governments can all be protected by the adoption of a system whereby successive prosecution by state and federal officials is forbidden except in those circumstances where the state and federal interests are sufficiently similar that the interests of one can be protected even if prosecution is initiated by the other. Whether such a system is wise and should be implemented, however, must be left to the legislatures of the state and federal governments.[1] There is nothing in the Constitution or decisions of this Court interpreting the Constitution to indicate that such a system is mandated. As long as the doctrine of dual sovereignty is viable, a state may relitigate an issue of ultimate fact which has been determined in a federal prosecution and may prosecute an individual even though he has been acquitted of the same act in a federal court. This is so regardless of whether the state and federal government's interests are identical.

(1)

In a proceeding in which the doctrine of collateral estoppel is raised as a defense, the defendant must introduce in evidence a transcript of the prior trial to insure that identity of issues and parties exists.

The petitioner seeks a ruling by this Court that it is not necessary for a defendant who relies on the defense

---

1. As pointed out in the petitioner's footnote 2 at page 15 of his petition for writ of certiorari, numerous states have passed laws forbidding successive federal and state prosecutions. Pennsylvania and Michigan have imposed similar restrictions by judicial interpretation. See, *Commonwealth* v. *Mills*, 447 Pa. 168, 286 A.2d 638 (Pa. 1971); *People* v. *Cooper*, ... Mich. ....., 247 N.W.2d 866 (Mich. 1976).

of collateral to introduce at his second trial the transcript of his first trial. He argues that regardless of whether the transcript is introduced, the doctrine of collateral estoppel would apply. In *Ashe* v. *Swenson, supra,* this Court specifically noted:

> "Where a previous judgment of acquittal was based upon a general verdict, . . . this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' . . ." *Ashe* v. *Swenson, supra,* at 444, quoting Mayers and Yarbrough, *Bis Vexari*: New Trials and Successive Prosecutions, 74 Harvard Law Review 1, 38-39.

This Court, then, like many other courts in the federal system has recognized that the doctrine of collateral estoppel cannot be applied unless the record of the first trial is produced to insure what issues of facts were decided in that prior trial. See, e.g., *United States* v. *Cala,* 521 F.2d 605, 608 (2d Cir. 1975); *United States* v. *Smith,* 446 F.2d 200, 203 (4th Cir. 1971); *United States* v. *Tierney,* 424 F.2d 643, 645 (9th Cir. 1970), cert. denied, 400 U.S. 857 (1970); *United States* v. *Friedland,* 391 F.2d 378, 382 (2d Cir. 1968), on remand, 316 F.Supp. 459 (S.D.N.Y. 1970), affirmed, 441 F.2d 855 (2d Cir. 1971), cert. denied, 404 U.S. 932 (1971). The petitioner here, however, argues that the introduction of the transcript was not necessary in his case because the only fact issue peculiar to the federal trial was whether the bank robbed was insured by the FDIC. That fact alone should be sufficient to necessitate the production of the transcript. Moreover, it is for the court and

not the defendant to decide whether there has been a sufficient similarity of issues for a defense of collateral estoppel to be applicable. It is not unduly burdensome to require a defendant to produce the transcript and complete the record.

CONCLUSION

Wherefore, respondent respectfully submits that the petition for certiorari should be denied.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

PRESTON DEAN
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321
Attorneys for Respondent

NANETTE LAUGHREY
Assistant Attorney General
Of Counsel